CITY OF BOERNE REVISITED

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Professor Law "discusses the political and ethical questions that confront lawyers and judges in deciding whether to use arguments they believe to be generally wrong to support particular causes and litigants."[1] She argues that "while the Court's dramatic new federalism is profoundly disturbing, reliance [by liberals] upon its rules in particular cases is not."[2]

The Supreme Court's recent decision in *Bush v. Gore*,[3] as contrasted with its prior decision in *City of Boerne v. Flores*,[4] suggests that the conservatives, but not the liberals, on the Supreme Court have heeded her message that one can and should rely on arguments with which one disagrees philosophically. In *Bush v. Gore*, the five conservative members of the Court found an equal protection violation whereas the four liberals dissented. The conservative members of the Court, however, were very careful to write an opinion that would not extend beyond the immediate Presidential election controversy to other cases involving more traditional claims of equal protection violations brought on behalf of minority voters.[5] By contrast, in *City of Boerne*, two liberal members of the Court, Justices Stevens and Ginsburg, joined four conservative members of the Court to rule that the Religious Freedom Restoration Act (RFRA)[6] was unconstitutional as applied to the states because it

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1. Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 372 (2002).

2. *Id.*

3. 531 U.S. 98 (2000).

4. 521 U.S. 507 (1997).

5. "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Gore*, 531 U.S. at 109. The concurring opinion by Chief Justice Rehnquist, which was joined by Justices Scalia and Thomas, offered even stronger language to limit the holding to the facts of the *Gore* decision. They recognized that "[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law." *Id.* at 112. But they also noted: "We deal here not with an ordinary election, but with an election for the President of the United States." *Id.*

6. The statute at issue in *City of Boerne* was the Religious Freedom Restoration Act (RFRA). "[RFRA] sailed through both houses of Congress, passing unanimously in the House of Representatives

exceeded Congress's authority under Section 5 of the Fourteenth Amendment.[7] The liberal members of the Court, however, did not attempt to write narrow language to confine the decision to its facts; instead, they joined language which is otherwise inconsistent with the understanding that Section 5 extends broad authority to Congress to enact civil rights legislation.[8] That language laid the seeds for a narrower conception of Congress's authority under Section 5 to enact civil rights legislation.[9] I will argue that liberals need to learn to craft arguments to strike down conservative legislation[10] which, if possible,

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and drawing only three votes in opposition in the Senate." Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438 (1994).

7. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

8. The *City of Boerne* Court disavowed the language in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *City of Boerne*, 521 U.S. at 527-28. In addition, it crafted a "congruence and proportionality" test that had never been mentioned in previous Section 5 cases. *See id.* at 533. Finally, the decision in *City of Boerne* failed to build on the "ratchet up" theory articulated by the Court in *Katzenbach* which had been used to explain why Congress could expand but not dilute Section 1 rights through its Section 5 enforcement authority. *See Katzenbach*, 384 U.S. at 651 n.10 (1966).

9. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 92 (2000) (holding that Age Discrimination in Employment Act did not validly abrogate states' sovereign immunity). Justice Stevens authored a dissent in *Kimel* that was joined by Justices Souter, Ginsburg and Breyer. *Id.*

10. As bipartisan legislation, I recognize that it is not fair to describe RFRA as "conservative" legislation. The impetus to enact RFRA, however, came from religious organizations rather than civil rights organizations. For example, the initial testimony in support of RFRA was received from the Coalition for the Free Exercise of Religion, National Association of Evangelicals, National Council of Churches, The American Jewish Congress, and the Anti-Defamation League as well as from the People for the American Way Action Fund. *See Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 26-60 (1990). Hence, RFRA is not the traditional, liberal civil rights legislation which has been enacted pursuant to Section 5. Many of the organizations that supported RFRA might support the protection of religious exercise beyond the boundaries set by the Establishment Clause because their interest is in protecting the religious exercise of their members rather than defending the Constitution. A key exception to this pattern is that the ACLU supported RFRA although it does not appear to have been a leading proponent of the legislation.

The ACLU's position on RFRA is baffling given its "tendency to advocate highly secularist and separationist readings of the First Amendment." Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 300 n.290 (1994). In fact, "the ACLU spearheaded the unsuccessful challenge to § 702 of Title VII, which accommodates the hiring needs of religious employers, in part because that provision, like RFRA, exceeded the requirements of the Free Exercise Clause . . . and preferentially discriminated pursuant to the criterion of religious identity." *Id.* Although the ACLU did not testify at the first hearing on RFRA, Nadine Strossen, President of the ACLU's National Board of Directors, did testify at later House and Senate hearings that RFRA was constitutional. *See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 63 (1992); *The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Comm. on the Judiciary*, 102d Cong. 171 (1992). The ACLU, however, did not write an amicus brief on the constitutionality of RFRA for the Supreme Court. Thus, I suspect its support for RFRA was soft.

Any doubt about whether RFRA was, in fact, conservative legislation can be resolved by examining how it has been used. Conservative religious groups have attempted to use it to avoid compliance with sexual orientation anti-discrimination laws.

will not jeopardize their own legislative agenda. I will argue that RFRA should have been struck down on much narrower grounds, either by a finding that Congress exceeded its authority under *Marbury v. Madison*[11] or that it violated the special rules that apply when it seeks to use Section 5 to enforce the Free Exercise Clause.[12] The Establishment Clause acts as a unique ceiling to Congress's authority to use Section 5; that unique ceiling does not apply outside the religious exercise context. This revisionist understanding of why RFRA was unconstitutional would not jeopardize Congress's authority to use Section 5 to enact civil rights legislation.[13]

Like the Commerce Clause,[14] Section 5 is a part of the Constitution that empowers Congress to enact legislation. Congress can use that authority to enact legislation to enforce Section 1 of the Fourteenth Amendment.[15] In light of the decision in *Seminole Tribe v. Florida*,[16] Congress must use Section 5 when it desires to enact legislation which provides for a private damages remedy against state actors. It also occasionally uses Section 5 to justify legislation to enforce Section 1 even when the remedy does not constitute a private damages remedy against state actors.[17] To the extent that the current Congress desires to enact

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11. 5 U.S. (1 Cranch) 137, 176 (1803).

12. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

13. I therefore agree with Professor Marci Hamilton, who has argued that RFRA cannot be constitutionally applied to federal law because the Establishment Clause limits Congress when it regulates the states or federal government. Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998). Professor Hamilton was lead counsel for the City of Boerne, Texas in *City of Boerne v. Flores*.

14. "The Congress shall have Power . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

15. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

16. 517 U.S. 44, 72-73, 76 (1996) (holding that the Eleventh Amendment and the doctrine of sovereign immunity limits Congress's authority to provide private remedies against state actors when it is acting pursuant to the Commerce Clause).

17. Two examples are the civil remedies provision of the Violence Against Women Act (VAWA) and RFRA. In VAWA, Congress sought to justify civil remedies for the victims of gender-motivated violence under the theory that this statute could be justified under the Commerce Clause or Section 5. The Supreme Court rejected the Commerce Clause justification pursuant to its decision in *United States v. Lopez*. *See* United States v. Morrison, 529 U.S. 598, 617-18 (2000). The government therefore tried to justify the statute under Section 5 by arguing that it sought to correct the pervasive bias in various state justice systems against victims of gender-motivated violence. *Id.* at 619. In RFRA, Congress sought to require

new legislation that seeks to enforce Section 1 of the Fourteenth Amendment, it may use Section 5 as its authority. Liberals, therefore, need to be cautious in making Section 5 arguments to strike down conservative legislation because they may wish to justify new or existing legislation under Congress's Section 5 authority. Arguments used in one setting to invalidate conservative legislation could backfire when liberals seek to justify their own legislative agenda.

In this essay, I will argue that liberal jurists such as Justices Ginsburg and Stevens could have found that RFRA was unconstitutional without joining language that would potentially limit Congress's authority when enacting civil rights legislation pursuant to Section 5.[18] Congress has recently enacted the Religious Land Use and Institutionalized Persons Act of 2000[19] which suffers from many of the same flaws found in RFRA.[20] This new statute will give liberals a second opportunity to challenge conservative legislation. Rather than make arguments which may lead to the further narrowing of Congress's Section 5 authority, liberals can learn to make arguments that will lead to the invalidation of this legislation without generally harming Congress's Section 5 powers.

I. BACKGROUND LEGAL CONTEXT

Congress enacted the Religious Freedom Restoration Act (RFRA) in a legal climate in which it understood itself to have broad authority to legislate under Section 5 of the Fourteenth Amendment. The pivotal case in defining the scope of Congress's authority prior to *City of Boerne* was *Katzenbach v. Morgan*.[21] Congress sought to enforce Section 1 of the

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governmental entities to create exceptions for neutral laws that might substantially burden religious exercise. *See* City of Boerne v. Flores, 521 U.S. 507 (1997). Although RFRA did not provide for monetary relief, Congress rested its authority to enact the statute on Section 5. Presumably, it could not conceive of a plausible Commerce Clause or spending power argument for the legislation. These two examples of use of Section 5 by Congress are unusual. More typically, Congress uses Section 5 when it is seeking to create a remedy for private monetary damages against state actors and, in light of *Seminole Tribe*, cannot offer a Commerce Clause justification. *See* Alden v. Maine, 527 U.S. 706, 759-60 (1999) (FLSA not constitutionally applied to the states); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672-75 (1999) (Trademark Act not constitutionally applied to the states); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647-48 (1999) (Patent Act not constitutionally applied to the states); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66-67 (2000) (Age Discrimination in Employment Act not constitutionally applied to the states).

18. Justice Ginsburg merely joined the majority opinion without separate comment. *City of Boerne*, 521 U.S. at 509. Justice Stevens joined the majority and wrote a brief concurring opinion. *Id.* at 536 (Stevens, J., concurring).

19. 42 U.S.C. § 2000cc.

20. *See infra* Part IV.

21. 384 U.S. 641 (1966).

Fourteenth Amendment by providing that no person who has successfully completed the sixth primary grade in an American school in which the predominant language is other than English shall be disqualified from voting under any literacy test. The statute at issue in *Katzenbach* invalidated certain literacy tests for voting which would have withstood challenge under the Supreme Court's prior decision in *Lassiter v. Northampton County Board of Elections*.[22] Nonetheless, the Supreme Court accepted the argument that Congress could strengthen the existing constitutional norms in the voting rights area through legislation enacted pursuant to Section 5. This power, however, only went in one direction: Congress could "ratchet up"[23] but not "dilute" constitutional guarantees through its Section 5 powers.[24] In addition, the *Katzenbach* Court noted that Congress could not use its enforcement authority under Section 5 to violate another provision of the Constitution.[25] In the voting rights context, Congress was attempting to enhance existing rights and was not doing so in a way that would violate any other constitutional principles. Hence, the Voting Rights Act provision withstood constitutional challenge. Nearly twenty years later, Congress sought to use this Section 5 authority to enhance the accommodation protections offered to religious entities under RFRA.

The *Katzenbach* decision, however, did not directly support the enactment of RFRA for two important reasons. First, *Katzenbach* was decided during an era in which the Court had a very respectful relationship with Congress.[26] As part of this respectful relationship, the Court tended to defer to Congress's factfinding and conclusions. Hence, although the factual justification for Congress's need to enforce equal protection principles with its special literacy rule in the Voting Rights Act was limited, the Court deferred to Congress's expertise on such matters in the *Katzenbach* decision. Hindsight reveals that the Court was becoming increasingly skeptical of Congress's expertise as reflected in its decisions in *City of Boerne v. Flores*,[27] *United States v. Lopez*,[28] *Kimel v. Florida Board of Regents*,[29] and *United States v. Morrison*.[30] Hence, the mere fact that

22. 360 U.S. 45, 50-53 (1959).

23. For further discussion of the ratchet metaphor, see Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995).

24. *Katzenbach*, 384 U.S. at 651 n.10. For further discussion of Section 5, see Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000).

25. *Katzenbach*, 384 U.S. at 651 n.10.

26. For further discussion of this argument, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

27. 521 U.S. 507 (1997).

28. 514 U.S. 549 (1995).

29. 528 U.S. 62 (2000).

30. 529 U.S. 598 (2000).

Congress concluded that it needed to enact legislation such as RFRA to enforce religious freedom no longer meant that the Court would defer to Congress's judgment. Although Professor Law describes this sequence of case law as reflecting a "new federalism,"[31] I would be equally inclined to describe it as a separation of powers revival. Congress was not aware that it needed to do more than hold a few hearings and draft reasonable legislation to enforce Section 1 of the Fourteenth Amendment when it enacted RFRA.

Second, *Katzenbach* was decided in the race relations context. Under its holding, Congress could enforce, but not dilute, Section 1 of the Fourteenth Amendment through its Section 5 enforcement powers. It also could not use this "ratchet up" authority to violate other constitutional provisions. The Court has never found that this "ratchet up" theory has any ceiling in the race relations context.[32] The religious freedom context, however, is more complicated because the Establishment Clause serves as a ceiling on Congress's authority. Congress may not provide such broad accommodation to religion that it violates the neutrality principles reflected in the Establishment Clause.[33] A careful observer of the Court's jurisprudence in this area could see that an attempt to mandate accommodation of religion under Section 5 could result in the violation of the Establishment Clause.

At the time that Congress was drafting RFRA, the Court had decided two recent Establishment Clause cases which drew into question the authority of governmental entities to accommodate religion. In 1985, the Supreme Court held in an 8-1 decision in *Estate of Thornton v. Caldor, Inc.*[34] that a Connecticut statute which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath violates

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31. *See* Law, *supra* note 1, at 372.

32. *See* South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (upholding provisions of the Voting Rights Act under Section 2 of the Fifteenth Amendment); Oregon v. Mitchell, 400 U.S. 112, 118 (1970) (upholding 1970 amendments to Voting Rights Act prohibiting use of literacy tests and other discriminatory devices under Section 2 of the Fifteenth Amendment while also finding that Congress did not have the authority to set the voting age at eighteen in state and local elections); City of Rome v. United States, 446 U.S. 156, 183 (1980) (upholding provisions of the Voting Rights Act under Section 2 of the Fifteenth Amendment). Because Section 2 of the Fifteenth Amendment has virtually the same enforcement language as Section 5 of the Fourteenth Amendment, the case law under both sections of the Constitution is interchangeable. *Compare* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."), *with* U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

33. The leading case on the Establishment Clause is *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in which the Court announced the following test to be applied in cases involving the clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (citation omitted).

34. 472 U.S. 703 (1985).

the Establishment Clause.[35] Thus, under *Caldor*, if Congress sought to mandate the accommodation of religion under RFRA, it had to make sure that it was not providing protection that might be considered akin to "absolute protection."[36] Moreover, it needed to ensure that a neutral observer would not conclude that a governmental entity was conveying the message of endorsing a particular religious belief.

In a more recent opinion in *Board of Education of Kiryas Joel Village School District v. Grumet*,[37] decided in 1994, the Court clarified when a government entity's accommodation of religious beliefs will be considered to have violated the Establishment Clause. In *Grumet*, the state of New York had created a special school district following village lines so that the village could use public funds to establish a school for children with disabilities that would also accommodate their religious beliefs. Justice Souter wrote the opinion for the Court holding that this statute violated the Establishment Clause of the First Amendment. His opinion was joined in part by Justices Blackmun, Stevens, O'Connor, and Ginsburg, with Justice Stevens writing a separate concurrence joined by Justices Blackmun and Ginsburg. Although Justice Kennedy did not join the Souter opinion, he wrote a concurrence in which he also concluded that the statute violated the Establishment Clause. Hence, the Court concluded that the Establishment Clause was violated by a 6-3 vote.

The Stevens concurrence tried to articulate the line between accommodation of religion and establishment of religion:

> Affirmative state action in aid of segregation of this character is unlike the evenhanded distribution of a public benefit or service, a "release time" program for public school students involving no public premises or funds, or a decision to grant an exemption from a burdensome

35. *Id.* at 710-33.

36. As Justice O'Connor explained in her concurrence in *Caldor*:

> All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it. As such, the Connecticut statute has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny.

Id. at 711 (O'Connor, J., concurring) (citation omitted).

37. 512 U.S. 687 (1994).

> general rule. It is, I believe, fairly characterized as establishing, rather than merely accommodating, religion.[38]

Justice Stevens noted the problematic nature of a governmental entity offering a service to a religious entity that would not be offered to others.[39] Thus, he found that because the government crossed the line of neutrality towards religion, its conduct violated the Establishment Clause. He specifically acknowledged that the Establishment Clause serves as a ceiling to the accommodations that can be rendered pursuant to the Free Exercise Clause.[40] Justice Ginsburg joined this concurrence, presumably signaling that she agreed with his sense of the balance between these two constitutional clauses.[41]

Juxtaposed against these two recent cases which found an Establishment Clause violation was the case of *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[42] in which the Court upheld Title VII's exemption for religious entities.[43] The *Amos* decision is admittedly difficult to square with the Court's jurisprudence requiring religious exemptions to be less than absolute. The case may reflect the Court's traditional reluctance to upset rules created in the civil rights context, as reflected in the *Katzenbach* decision. More reflective of the Court's overall Establishment Clause jurisprudence, however, may be its decision in *Trans World Airlines, Inc. v. Hardison*[44] in which it narrowly construed Title VII's religious accommodation principle, thereby avoiding an Establishment Clause problem. Thus, the Court employed tools of statutory construction in *Hardison* to avoid having to conclude that Congress crossed the line from protecting religious freedom to violating the Establishment Clause. That cautious course allowed it to continue to avoid invalidating an aspect of one of Congress's civil rights laws. The Establishment Clause jurisprudence was therefore in a state of uncertainty when Congress enacted RFRA and should have, at the very least, given Congress pause when it drafted the legislation.

Thus, Congress enacted RFRA at a time when it presumed it had broad authority to do so under Section 5. Nonetheless, a close examination of recent Court cases should have revealed that it needed to proceed cautiously if it sought to use Section 5 to protect religious freedom as opposed to equal protection principles in the race context.

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38. *Id.* at 711-12 (Stevens, J., concurring).
39. *Id.* (Stevens, J., concurring).
40. *Id.* (Stevens, J., concurring).
41. *See id.* (Stevens, J., concurring).
42. 483 U.S. 327 (1987).
43. *Id.* at 330, 339.
44. 432 U.S. 63, 80-81 (1977).

Moreover, a crystal ball would have revealed that the Court was becoming less deferential to Congress in assessing the constitutionality of its actions.[45]

II. THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act was not enacted by a Congress that was moving cautiously in applying Section 5 jurisprudence to the religious freedom context. RFRA prohibited the government from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[46] Although this statute did not absolutely exempt religious entities from neutral rules of general applicability, it did impose the highest possible burden of justification, "strict scrutiny," on a governmental entity when such a rule substantially burdened the exercise of religion.

Congress enacted RFRA in response to a previous decision of the Court, *Employment Division v. Smith*,[47] in which the Court held that neutral, generally applicable laws that do not support a compelling state interest may be applied to religious entities even when such laws interfere with the exercise of religion.[48] Congress desired to strengthen the rights of religious entities to be exempted from neutral laws so that they could practice their religion without state interference. Although the principles enunciated in *Marbury v. Madison* prohibit Congress from overturning constitutional interpretations by the Court through a legislative act,[49] Congress may *strengthen* existing constitutional

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45. For further discussion of the crystal ball problem, see Colker & Brudney, *supra* note 26.

46. 42 U.S.C. § 2000bb-1 (1994).

47. 494 U.S. 872 (1990). In *Smith*, a law of general applicability was applied to members of the Native American Church who had lost their jobs because they had used peyote for sacramental purposes. Under state law, unemployment benefits were not available to individuals who lost their jobs as a result of criminal activity. *Id.* at 874. Because peyote use was unlawful, application of that general, neutral standard resulted in the loss of unemployment benefits. The Court held that the state did not have to justify its application of this neutral law to members of the Native American Church under a compelling interest standard. *Id.* at 882-890. Four members of the Court disagreed with the appropriate legal standard. *Id.* at 894. They argued that a compelling interest standard was appropriate if the law placed a substantial burden on the religious practices of individuals. *Id.* at 905-07 (O'Connor, J., concurring); *id.* at 909 (Blackmun, J., dissenting). Justice O'Connor found that Oregon had satisfied that test, *id.* at 905, while Justices Blackmun, Brennan and Marshall could see no compelling interest in justifying the law's application to the church. *Id.* at 909-21.

48. *Id.* at 885.

49. 5 U.S. (1 Cranch) 137, 176 (1803).

protections under Section 1 of the Fourteenth Amendment by enacting enforcement legislation pursuant to Section 5 of the Fourteenth Amendment.[50] Thus, through RFRA, Congress sought to use its Section 5 enforcement authority to strengthen the rights of religious entities to be able to exercise their religious beliefs without government interference. As in the voting rights area, Congress made conduct unlawful that would not have been unconstitutional under the Fourteenth Amendment and justified that expansion under *Katzenbach*'s "ratchet up" theory.

In 1996, the Archbishop of San Antonio brought suit under RFRA challenging the denial of a building permit which he needed to enlarge his church.[51] The building permit was denied through the neutral application of a law of general applicability—the city's historic landmark ordinance. The Archbishop sought to be exempted from the city ordinance through application of RFRA. The city refused to consider the exemption, arguing that RFRA was unconstitutional. The district court agreed with the city's argument, finding that Congress exceeded its enforcement authority under Section 5 by enacting RFRA, but it was reversed on appeal to the Fifth Circuit. The Supreme Court granted certiorari and reversed the Court of Appeals, concluding that RFRA was unconstitutional.[52]

Under RFRA, the city of San Antonio was required to justify its application of the historic landmark ordinance under a compelling interest standard which was a more rigorous standard than would have applied under the Constitution. Had it been enforced in *City of Boerne*, RFRA may have resulted in the Archbishop receiving permission to enlarge his church even though other, similar buildings that were being used for secular purposes in the city could not have been altered pursuant to the historical landmark ordinance. Because of the high burden of justification imposed on the governmental entity under RFRA, one could imagine that many religious entities would be excused from laws of general applicability that burdened their religious exercise.

The Religious Freedom Restoration Act was a clumsy attempt by Congress to use its Section 5 authority and thereby easily failed to meet the minimum standards set forth in *Marbury v. Madison*. Many members of Congress who supported this legislation apparently thought that Congress could "overturn" a constitutional law decision by the Court by "restoring" an earlier decision of the Court. This misunderstanding was

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50. *See* Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966).

51. Flores v. City of Boerne, 877 F. Supp 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

52. *City of Boerne*, 521 U.S. at 512.

enunciated in the "Purposes" section of the statute in which Congress stated that one of the purposes of the Act was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) . . . ."[53] It was also reflected in the title of the bill—the Religious Freedom *Restoration* Act. Although Representative Henry Hyde, a chief sponsor of the legislation, understood that "the label restoration is inappropriate in this context since the Congress writes laws—it does not and cannot overrule the Supreme Court's interpretation of the Constitution,"[54] the "restoration" language was used in the "Purposes" section and title of RFRA. Congress's arrogance in articulating an unconstitutional purpose invited the Court to overturn the legislation irrespective of how carefully its substantive portions were drafted. A reading of the title and "Purposes" section could have been the beginning and ending of the Court's opinion. It is hard to imagine a more direct attempt by Congress to exceed its constitutional authority.

Even if Congress had acted less arrogantly in announcing its title and purpose, it should have done a better job of understanding the scope of its authority in the area of religion. Congress gave no consideration to the arguably special scope of its authority under Section 5 when it sought to enforce religious freedom rather than equal protection. Furthermore, Congress had reason to be on notice that too vigorous accommodation of religion can violate the Establishment Clause. Although the compelling state interest standard did not constitute an absolute preference for religious entities, it did pose the problem of possibly providing undue preferential treatment to religious entities without balancing other interests in order to avoid an establishment of religion problem. Hence, the "ratchet up" theory from *Katzenbach* posed special problems in the religious freedom context, because Congress could bump up against the establishment of religion in its attempt to protect religious exercise.[55]

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53. 42 U.S.C. § 2000bb(b)(1) (1994). Professors Eisgruber and Sager argue that Congress did not actually "restore" these legal standards because RFRA embodied a more stringent test than the Court had in fact employed prior to the *Smith* decision. Eisgruber & Sager, *supra* note 6. The question of whether Congress misstated these prior legal decisions is not relevant to my argument in this essay.

54. 139 CONG. REC. H2358 (May 11, 1993) (statement of Rep. Hyde).

55. I do not mean to suggest that it was obvious at the time that RFRA was unconstitutional. The *City of Boerne* decision was part of a series of decisions in which the Court modified existing precedent in what Professor Law characterizes as a new federalism and which I characterize as a separation of powers revival. It is not fair to criticize Congress or the liberal members of the Court for not foreseeing that revival. Interestingly, two constitutional law scholars who argued after RFRA was enacted that it was unconstitutional did not foresee the Court's decision in *Lopez*. *E.g.*, Eisgruber & Sager, *supra* note 6, at 460 n.80 ("To be sure, the Court of Appeals for the Fifth Circuit recently held that Congress had intruded impermissibly upon state authority when it prohibited persons from carrying guns within five-hundred feet

In reviewing RFRA, the House Judiciary Committee simply assumed that the "ratchet up" theory from *Katzenbach* could be routinely applied to the Free Exercise Clause without giving consideration to the tension between religious accommodation and the establishment of religion.[56] Although its report did generally acknowledge that Congress could not "create a statutory right prohibited by some other provision of the Constitution,"[57] it did not apply that constitutional principle to RFRA. Instead, the Committee made no specific inquiry as to whether RFRA might be inconsistent with the Establishment Clause of the First Amendment.

The Senate report recognized that Congress did not have the power to overrule a constitutional decision but was also conclusory in its analysis of why RFRA fell under its Section 5 authority.[58] Unlike the

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of a school. We believe the Court should, and likely will reverse the decision of the court of appeals.") (citation omitted).

Hence, it may have been entirely reasonable for Congress to assume that there would be a straight line of constitutionality from *Katzenbach* to *City of Boerne*. Given the longstanding tradition of the Court deferring to Congress's judgment in enforcing Section 5, I acknowledge that Congress had little or no reason to recognize that that period of deference was coming to an end. Nonetheless, I am suggesting that the votes of Justice Stevens and Ginsburg in *City of Boerne* suggest that RFRA could be found unconstitutional without the Court upsetting the prior understanding of the deferential relationship between Congress and the Court, because Justices Stevens and Ginsburg have not joined subsequent opinions in which the Court has displayed less deference for Congress's work. For further discussion of this historical progression of growing disrespect for Congress by the Court, see Colker & Brudney, *supra* note 26.

56. The report from the House Judiciary Committee stated:

> Finally, the Committee believes that Congress has the constitutional authority to enact H.R. 1308. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself. However, limits to congressional authority do exist. Congress may not (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision. Because H.R. 1308 is well within these limits, the Committee believes that in passing the Religious Freedom Restoration Act, Congress appropriately creates a statutory right within the perimeter of its power.

H.R. REP. NO. 103-88, at 9 (1993) (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Thornburgh v. Gingles, 478 U.S. 30 (1986)).

57. *Id.*

58. The Senate Report stated:

> [C]ongressional power under section 5 to enforce the 14th amendment includes congressional power to enforce the free exercise clause. Because the Religious Freedom Restoration Act is clearly designed to implement the free exercise clause—to protect religious liberty and to eliminate laws "prohibiting the free exercise" of religion—it falls squarely within Congress' section 5 enforcement power.
>
> While the act is intended to enforce the right guaranteed by the free exercise clause

House report, however, the Senate report did not even acknowledge that enforcement legislation must not run afoul of other constitutional rights. Its analysis simply did not contemplate the Establishment Clause as having a role in defining Congress's authority under the Free Exercise Clause.

This clumsy analysis may be a product of RFRA's enormous popularity in Congress.[59] Although Congress held hearings on RFRA and its constitutionality, only one scholar cautioned Congress that RFRA might suffer from constitutional problems. Professor Ira Lupu testified on May 14, 1992, that the question of whether RFRA could be justified under Section 5 was a close one.[60] His testimony, however, was buried at the end of a lengthy hearing and appears to have received little consideration by Congress. Instead, Congress appears to have primarily relied on the testimony of Professor Douglas Laycock, who later

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> of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion, except where such action is the least restrictive means of furthering a compelling governmental interest.

S. REP. NO. 103-111, at 14 n.43 (1993).

59. RFRA passed the House by a voice vote on May 11, 1993. 139 CONG. REC. H2356 (1993). The Senate adopted the House version with some amendments and that version passed by a vote of 97-3 on October 27, 1993. 139 CONG. REC. S14,461, S14,471 (1993). The House then approved the Senate version by motion, again with no recorded roll call vote on November 3, 1993. 139 CONG. REC. H8713 (1993).

60. Professor Lupu stated:

> I think the question is much closer and more difficult than [Professor Laycock] . . . suggests. The leading precedent for an expansive view of congressional power, Katzenbach v. Morgan, 384 U.S. 641 (1966), was the product of a Court far more attuned to the expansion of rights and far less concerned with insulating the states from federal power than is the current Court.
>
> *Katzenbach*, and other decisions on which Professor Laycock relied, involve statutory extensions of voting rights or other anti-discrimination concerns to circumstances beyond those which the Supreme Court had held unconstitutional. In all of these matters, however, the Congress had legislated in a general direction consistent with that taken by the courts. Respected opinions in the leading cases on this subject take the view that Congress can act to outlaw state practices inconsistent with judge-made principles, but cannot refashion judge-made law whole cloth. *Oregon v. Mitchell*, 400 U.S. 112, 204-09, 294-96 (1970) (Congress lacks power to extend the franchise in state elections to persons under 21 years of age) (opinions of Justice Harlan and Stewart). The limits suggested by the Supreme Court's decisions concerning congressional power to enforce the fourteenth amendment present significant impediments to the Religious Freedom Restoration Act. . . . [I]t is hard to see on what basis Congress can substitute a stringent religion-protective doctrine for the Court's new hands-off approach to the Free Exercise Clause. To do so would be to reject the Court's direction and result, and to substitute a highly general and expansive doctrine of religious freedom for a much narrower one chosen by the Court.

Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 102d Cong. 389-91 (1992).

unsuccessfully defended RFRA before the Supreme Court.[61] Professor Laycock offered strong testimony supporting RFRA's constitutionality. He acknowledged that Congress may not dilute other powers found in the Bill of Rights or override other express allocations of power in the Constitution through enforcement of Section 5.[62] However, in his first testimony before Congress, when RFRA was introduced in 1990, he did not mention the Establishment Clause problem at all.[63] When he testified on the bill two years later, he made brief reference to a possible Establishment Clause challenge, but cited *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* to support the argument that the legislation did not create an Establishment Clause problem.[64] In addition, Professor Laycock made no attempt to reconcile *Amos* with other decisions in which the Court had found an Establishment Clause problem.[65] He saw a relatively straight line from the Court's decision in *Katzenbach v. Morgan* to the constitutionality of RFRA and took little pause to consider the particular problems that exist when Congress seeks to enforce the Free Exercise Clause due to the tensions that exist between the Free Exercise and Establishment Clauses.[66]

III. *CITY OF BOERNE* DECISION

Congress's rush to enact RFRA and its misunderstanding of the scope of its authority to overturn prior constitutional law decisions ran into a fatal collision with the Supreme Court in *City of Boerne*. Although three members of the Court dissented from the conclusion that RFRA was

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61. *See Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 102d Cong. 330-59 (1992) ((statement of Douglas Laycock, Professor of Law, The University of Texas); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Comm. on the Judiciary*, 102d Cong. 92-97 (1992) (statement of Douglas Laycock).

62. *See Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. 355 (1992) (statement of Douglas Laycock).

63. *See Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 72-79 (1990).

64. *See Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. 355 (1992); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Comm. on the Judiciary*, 102d Cong. 76-97 (1992) (statement of Douglas Laycock).

65. *See Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. 355 (1992) (statement of Douglas Laycock).

66. Nonetheless, two law review articles were published shortly after RFRA was enacted which argued that RFRA violated the Establishment Clause. *E.g.*, Idleman, *supra* note 10, at 285-302; Eisgruber & Sager, *supra* note 6. These articles were both cited in Petitioner's brief to the Supreme Court in *City of Boerne*, so the Supreme Court was made aware of the special problems that exist when Section 5 is applied to the religion context. *See* Petitioner's Brief at 47, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), *available at* 1996 WL 689630. Neither of these articles, nor the Petitioner's brief, however, interwove the Establishment Clause problem with the Section 5 analysis, as I have suggested in this article.

unconstitutional, the entire Court implicitly recognized that RFRA raised problems under *Marbury v. Madison*.[67] The dissenters concluded that the prior *Smith* decision should be overturned by the Court and therefore the Court should permit Congress to enforce the *Smith* standard through RFRA.[68] No member of the Court concluded that Congress had the authority to "restore" the *Smith* decision as a proper interpretation of the First Amendment. The Court therefore interpreted RFRA in its most arrogant light—that Congress was deliberately flouting *Marbury* in announcing the proper interpretation of the Free Exercise Clause.[69]

The *City of Boerne* Court, however, did not merely conclude that RFRA violated the basic principles enunciated in *Marbury v. Madison* regarding which institution gets to interpret the Constitution. It also denounced the language in *Katzenbach v. Morgan* "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in Section 1 of the Fourteenth Amendment."[70] The Court then crafted a "proportionality and congruence" test to replace *Katzenbach's* "dilution" test. Under this new standard, legislation could be unconstitutional under Section 5 even if it did not conflict with another constitutional provision. While it was still constitutional, for example, for Congress to enforce the Equal Protection Clause by prohibiting certain literacy requirements under the Voting Rights Act, RFRA was unconstitutional because of "a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[71] This new standard for Section 5 jurisprudence went well beyond the *Katzenbach* dilution test, and it later resulted in the Court invalidating the private damage remedies created against state actors in the Age Discrimination in Employment Act even though Congress was not being so arrogant in that context as to overturn a prior constitutional holding.[72]

Although the "Purposes" section of RFRA and the Act's title appear to reflect Congress's arrogance in violating *Marbury*, the substantive section announcing the rule of law as well as the committee reports explaining the authority for the statute offer a different view. One could understand Congress as merely using its statutory authority to raise the level of protection in the free exercise area while leaving the constitu-

67. *See* 521 U.S. 507, 527-29 (1997).
68. *Id.* at 546-66.
69. *Id.* at 516.
70. *Id.* at 527-28.
71. *Id.* at 533.
72. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

tional standard unchanged for all actions not covered by this statute. Under that view, then, the legal question would be whether Congress raised the bar so high that it conflicted with the Establishment Clause, not whether it inherently violated the Constitution by attempting to "restore" the law of the First Amendment to an earlier interpretation.

This mode of analysis would have been entirely consistent with the Court's earlier opinion in *Katzenbach v. Morgan*.[73] In *Katzenbach*, the Voting Rights provision at issue, like RFRA, sought to create rights beyond the legal standard created by the Court in an earlier constitutional law decision.[74] In that case, the Court held that Congress could enact enforcement legislation under its Section 5 powers so long as it did not act in a way that was inconsistent with the "letter and spirit of the constitution" and did not "restrict, abrogate, or dilute" existing constitutional guarantees.[75]

No member of the Court sought to measure the constitutionality of RFRA against the dilution standard from *Katzenbach*. Instead, they each accepted an interpretation of RFRA under which Congress was directly violating *Marbury v. Madison* by changing the constitutional standard. Nonetheless, Justice Stevens's concurring opinion provides us with a hint of how such an analysis might have proceeded. In a brief concurring opinion, he asserts that RFRA violates the Establishment Clause:

> If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.[76]

Justice Stevens's assessment, however, was inadequate because he did not recognize the relationship between the First Amendment and

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73. 384 U.S. 641 (1966).

74. Despite the Court's holding in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 53-54 (1959), that the North Carolina English literacy requirement did not violate Section 1 of the Fourteenth or Fifteenth Amendments, Congress enacted section 4(e) of the Voting Rights Act of 1965, which made it unlawful for New York City to impose an English literacy requirement on voters who had been educated in Puerto Rico. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973b(e) (1994).

75. *Katzenbach*, 384 U.S. at 651 n.10.

76. *City of Boerne*, 521 U.S. at 537 (citing Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985)) (Stevens, J., concurring).

Section 5. Justice Stevens's First Amendment observation is directly relevant to a proper Section 5 analysis because an important Section 5 principle is that Congress may not violate another constitutional principle when it enforces the Fourteenth Amendment. Unfortunately, Justice Stevens's opinion does not attempt to interweave his First Amendment Establishment Clause concern into his Section 5 analysis. In addition, no member of the Court joined his opinion, leaving five members of the Court (including Justice Ginsburg) as entirely joining the majority's Section 5 analysis in *City of Boerne*. If the liberals on the Court were to join the holding to strike down RFRA as exceeding Congress's constitutional authority, a more cautious holding was clearly available. Justices Ginsburg and Stevens could have noted that special tensions exist when Congress tries to enforce the Free Exercise Clause that do not exist under the Equal Protection Clause, because of the peculiar role of the Establishment Clause. Hence, they could have found that although the "ratchet up" theory from *Katzenbach* is good law when Congress seeks to enforce the Equal Protection Clause, it does not directly apply when Congress seeks to enforce the Free Exercise Clause, because the Establishment Clause serves as a limitation on Congress's authority.

Consistent with their decisions in *Board of Education of Kiryas Joel Village School District v. Grumet* and *Estate of Thornton v. Caldor, Inc.*, Justices Stevens and Ginsburg could have concluded that RFRA constituted an unconstitutional use of Section 5 because Congress did not properly strike the balance between the Free Exercise and Establishment Clauses.[77] This type of cautious decision would have been far preferable to joining the majority decision in *City of Boerne*, because it would have prevented the liberal members of the Court from joining an opinion which set the stage for restricting the scope of Congress's authority in enacting civil rights legislation.

That type of cautious argument, however, was not offered by any of the litigants or amicus who participated in the case.[78] When lawyer Jeffrey Sutton, who argued the case as amicus curiae for petitioner, was asked whether he was relying on the argument that RFRA violates the Establishment Clause, he replied that he was not and that he hoped the

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77. Nonetheless, they would have had to distinguish those two cases from their opinions in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) and *City of Boerne*. In *Amos*, the Court upheld the religious exemption to Title VII's prohibition against religious discrimination in employment to secular nonprofit activities of religious organizations. 483 U.S. at 338.

78. Legal academics, however, did argue that RFRA violated the Establishment Clause, shortly after the statute was enacted. *See* William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995); Idleman, *supra* note 10; Eisgruber & Sager, *supra* note 6.

Court would reject such an argument (even though the Establishment Clause argument was made in Petitioner's brief).[79] He recognized that the Establishment Clause serves as a "ceiling" in the free exercise area but argued that RFRA was under that ceiling (although it suffered from other constitutional infirmities). In a legal environment in which no one pressed the Establishment Clause argument, it may have been difficult to expect the Court to craft its own establishment theory.

Professor Law offers us another hint as to why Justice Ginsburg may not have pursued the path of writing a separate, concurring opinion in *City of Boerne*. Law observed in her oral remarks for this symposium that Justice Ginsburg criticized the multiplicity of opinions in many Supreme Court cases in an article she wrote before being elevated to the Supreme Court.[80] Justice Ginsburg argued that "overindulgence" in separate opinions harms the colleagiality of the Court.[81] I would argue, however, that it is more important to develop a coherent understanding of an area of law than to further the collegiality of the Court. Now that Justices Ginsburg and Stevens have begun to dissent from the Court's application of *City of Boerne* in the civil rights context, they have an opportunity to revisit their analysis in *City of Boerne*. They can begin to develop a coherent Section 5 jurisprudence which recognizes that the holding in *City of Boerne* is consistent with their understanding of the Establishment Clause but not reflective of their understanding of how those principles apply to the civil rights context.

IV. THE FUTURE?

Congress has recently enacted new legislation to protect religious freedom which presents many of the same problems reflected in RFRA. This statute, entitled the Religious Land Use and Institutionalized Persons Act, is a somewhat more narrow version of RFRA. Rather than create the compelling interest test for all governmentally created neutral rules that substantially burden religious exercise, this statute only provides relief when a land use regulation creates such a burden.[82] As with RFRA, the committee report justifies this language as being valid under Section 5 of the Fourteenth Amendment.[83] It tries to justify the provision as constitutional enforcement language based on the testimony

79. *See* Supreme Court Transcript, City of Boerne v. Flores, 521 U.S. 507 (No. 95-2074), *available at* 1997 WL 87109, at *31-32.

80. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191 (1992).

81. *Id.*

82. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc.

83. H.R. REP. NO. 106-219, at 17-18 (1999).

that Congress collected on how land use regulations can substantially burden religious exercise.[84] Nonetheless, the statute leaves in place the strict scrutiny test found in RFRA which, as I have argued above, is of doubtful constitutional validity in light of Establishment Clause problems.

Unlike RFRA, the Religious Land Use and Institutionalized Persons Act did not sail through Congress with virtual unanimity. Two reports with dissenting views were authored by members of the House Judiciary Committee when the bill was considered by that chamber. The bill was passed by unanimous consent in the Senate so there is no record of the vote, but it was passed by a vote of 306 to 118 with 10 members not voting in the House.[85] Although 199 of 222 Republicans voted for the bill, only 107 of 211 Democrats voted for it.[86] Congress glossed over any constitutional problems with the bill, but constitutional challenges can be expected.[87] Rather than stand on the sidelines, liberal organizations may want to participate in arguing that the Religious Land Use and Institutionalized Persons Act is unconstitutional.[88] The challenge will be to make the constitutional argument in such a way that does not do further damage to Congress's Section 5 authority to enact civil rights legislation. As I have suggested above, liberal organizations should argue that Section 5 jurisprudence is distinct in the religious freedom context. The Religious Land Use and Institutionalized Persons Act is unconstitutional not because it violates *City of Boerne*'s proportionality and congruence test, but because it violates the Establishment Clause in its attempt to protect religious freedom. Such clumsy and overinclusive efforts to protect religious freedom should not have an impact on liberals' attempts to enforce the Equal Protection Clause. The *Katzenbach* "ratchet up" theory can still have vitality if *City of Boerne* is confined to the religious freedom context.

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84. *Id.* at 17.

85. *See* 145 CONG. REC. H5608 (daily ed. July 15, 1999).

86. *Id.*

87. There have been a number of cases upholding the Religious Land Use and Institutionalized Persons Act. *See, e.g.*, Freedom Baptist Church of Delaware County v. Township of Middletown, No. Civ. A. 01-5345, 2002 WL 927804 (E.D. Pa. May 8, 2002); Mayweathers v. Newland, 258 F.3d 930 (9th Cir. 2001); Gerhardt v. Lazaroff, No. C2-95-517 (S.D. Ohio Feb. 25, 2002). In *Freedom Baptist Church*, the court considered but rejected an Establishment Clause argument, noting that only Justice Stevens decided *City of Boerne* on that basis. *See Freedom Baptist Church*, 2002 WL 927804 at *6.

88. The American Civil Liberties Union opposed the Religious Land Use and Institutionalized Persons Act because it was concerned that it might be used by religious organizations to undermine enforcement of civil rights laws. That same concern was expressed by the minority members of the House Judiciary Committee who opposed the bill. *See supra* note 83. The opponents of the bill, however, did not raise Establishment Clause concerns.